No. 09-1215

Supreme Court, U.S.
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In the Supreme Court of the United States

GREGORY LYNN NORWOOD, *Petitioner,*

v.

STEVE J. VANCE., ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Prison officials suspended outdoor exercise after inmates attacked correctional officers, almost killing one, in a facility that housed members of various street gangs. After exercise was resumed, continued violence caused prison officials to suspend exercise again.

A jury found that the exercise suspensions constituted deliberate indifference under the Eighth Amendment. The Ninth Circuit reversed the verdict because the district court refused to instruct the jury that prison officials were entitled to deference when balancing their competing obligations to ensure institutional security and provide exercise and found that prison officials were entitled to qualified immunity.

1. When an inmate's lawsuit contends prison officials imposed cruel and unusual punishment under the Eighth Amendment by restricting outdoor exercise following outbursts of prison violence, should a trial court instruct the jury that it should defer to prison officials' professional judgment and considered choice about whether the exercise restrictions were necessary to stop the violence and prevent its recurrence?

2. May the court of appeal vacate a jury verdict for instructional error and not remand for a new trial, but instead elect to review the facts in the light most

favorable to plaintiff and grant qualified immunity where the plaintiff has addressed that issue on the merits?

LIST OF PARTIES

1. Petitioner Gregory Lynn Norwood is a California prisoner who was confined at the California State Prison – Sacramento at the time the events at issue.

2. Respondents were prison administrators at the prison at the time of the events at issue and held the following positions: Cheryl Pliler and Mike Knowles, Wardens; James P. Walker and Thomas P. Goughnour, Associate Wardens; and Steve J. Vance and David I. Willey, Correctional Captains for the facility where Norwood was housed.

TABLE OF CONTENTS

Page

Opinions Below 1

Basis for Jurisdiction In This Court 1

Constitutional Provisions And Statutes Involved 1

Constitutional Provisions And Statutes Involved 2

Statement of the Case 3

Reasons Certiorari Should Be Denied 21

I. Certiorari Should be Denied Because the Ninth Circuit's Decision Comports with Established Law, and Does Not Conflict With the Decision of Another Court of Appeal. 21

II. Prison Officials Were Entitled to Qualified Immunity. 28

Conclusion 36

TABLE OF AUTHORITIES

Page

CASES

Allen v. Sakai
48 F.3d 1082 (9th Cir. 1995) 22
Bell v. Wolfish
441 U.S. 520 (1979) ..... *passim*
Devereaux v. Abbey
263 F.3d 1070 (9th Cir. 2001) (*en banc*) 33
Farmer v. Brennan
511 U.S. 825 (1994) ..... *passim*
Galvin v. Hay
374 F.3d 739 (9th Cir. 2004) 35
Hebbe v. Pliler
et al., No. 2:00-cv-306-GEB-PAN (JFM) 27
Hope v. Pelzer
536 U.S. 730 (2002) 34, 35
Hoptowit v. Ray
682 F.2d 1237 (9th Cir. 1982) 22
Hudson v. McMillian
503 U.S. 1 (1992) 22, 23
Hunter v. Bryant
502 U.S. 224 (1991) 33
Iacobucci v. Boulter
193 F.3d 14 (1st Cir. 1999) 29
Johnson v. California
543 U.S. 499 (2005) 25, 26
Johnson v. Lewis
217 F.3d 726 (9th Cir. 2000) ..... *passim*
Norwood v. Vance
591 F.3d 1062 (9th Cir. Jan. 7, 2010) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page

Ortiz v. Jordan
316 Fed.Appx. 449 (6th Cir. 2009), *cert.* granted 2010 WL 1641312 (Apr. 26, 2010) 29
Pell v. Procunier
417 U.S. 817 (1974) 25, 26, 31
Spain v. Procunier
600 F.2d 189 (9th Cir. 1979) 22, 34
T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n.
809 F.2d 626 (9th Cir. 1987) 31
Toussaint v. Yockey
722 F.2d 1490 (9th Cir. 1984) 22
Turner v. Safley
482 U.S. 78 (1987) 25, 26
Whitley v. Albers
475 U.S. 312 (1986) ..... *passim*
Wilson v. Seite
501 U.S. 294 (1991) 21

STATUTES

28 U.S.C. § 1254(1) 1
29 U.S.C. § 1983 2

CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment VIII ..... *passim*
U.S. Const. Amendment XIV 26

OPINIONS BELOW

The opinion below is reported at *Norwood v. Vance*, 591 F.3d 1062 (9th Cir. Jan. 7, 2010), and is reproduced at Petitioner's Appendix 1.

BASIS FOR JURISDICTION IN THIS COURT

The court of appeals' amended opinion and order denying petitioner's petition for rehearing and rehearing en banc was entered on January 7, 2010. (Pet. App. 1, 3.) Norwood petitioned for writ of certiorari on April 7, 2010. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. VIII provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

29 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Facts

Norwood is an African-American prisoner who was confined in Facility B at the California State Prison-Sacramento (CSP-Sacramento), where he was serving a life-term for murder at the time of the events at issue. (CR 124, DER 23:4-5, 10-11, 12-13.)[1] Norwood had a history of disciplinary violations for sneaking out of his cell and being out-of-bounds on the prison's main yard. (RT [Norwood] 558:16-21.)

1. Norwood's Housing Unit at CSP-Sacramento.

CSP-Sacramento is a maximum-security prison that houses California prisoners who pose the greatest threat to institutional security and staff safety. (CR 124, DER 23:14-15.) Facility B of the prison housed approximately 1,000 maximum-security prisoners of different races and ethnic groups - African-American, Caucasian, Hispanic, Asian, American Indian, and other (e.g., Pacific Islanders). (CR 124, DER 23:18-20.) The facility was known as the "gangster yard," and most of the violence at the prison occurred there. (DER 692, RT [Pliler] 484:7-10.) Although Norwood was identified as a member of the Black Guerrilla Family prison gang when he arrived at the prison, that information could not be verified, and he was not considered to be affiliated with any gang at the time of the 2002 and 2003 exercise suspensions at issue. (DER 771, RT [Norwood] 563:24-25.)

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[1] Citations are to the clerk's record in the district court and the excerpts of record on appeal.

The eight housing units that comprised Facility B were built around a main yard where, absent unusual conditions, outdoor exercise was available to prisoners. (CR 124, DER 23:21-22. The facility also had seven small concrete yards adjacent to all but one of the housing blocks. (CR 124, DER 23:23-24:1.) Each of those small yards could be used by no more than twenty inmates at a time.

2. Lockdown and Suspension of Normal Programming During 2002-2003 Violence at the Prison.

In January 2002, prison officials locked down Facility B and suspended normal programs, including outside exercise on the main yard, after an officer was stabbed in a dining hall and other officers were attacked by Hispanic inmates. (CR 124, DER 24:15-17.) That attack set off a two-year period of ongoing, pervasive violence at the prison.

Before these attacks, there had been no life-threatening assaults on staff in the facility's dining halls. (DER 683, RT [Pliler] 485:9-15; DER 771, 765, RT [Norwood] 557:3-21, 571:15-20; DER 463, RT [Norwood] 455:17-21).) Afterwards, there were a series of attacks on officers and inmate-on-inmate attacks along racial lines by members of ethnic street gangs over the next two years that prevented the prison from resuming normal operations and that led to further suspensions or modifications of normal programs, including the outdoor-exercise program. (CR 124, DER 24:18-25:4.) The lockdown and suspensions of normal programming occurred against a backdrop of violence that far exceeded anything prison officials had seen before and that was directed

not only at officers, but also at other inmates, often based on ethnic or gang conflicts. (DER 692, RT [Pliler] 484:11-18.) Prison officials received reports that there was a statewide "green light" for inmates to attack officers. (DER 873, RT [Pliler] 665:10-667:4.)

There is no general policy that mandates when to lock down a prison; what programs, including outdoor exercise, should be suspended and for which inmates; or when and how normal programming can be safely resumed. (DER 876, RT [Pliler] 668:7-14.) Those decisions depend on the facts of each incident. *(Id.)*

During a lockdown, normal programming is suspended. (CR 124, DER 24:2-5.) Inmates are confined to their cells and fed there, and are not allowed to go to assigned work or education programs, the law library, religious services, or regular visiting. *(Id.)* Canteen and telephone privileges are suspended, and inmates are not allowed to exercise on the yard. *(Id.)* Essential services, such as medical care, are provided, and inmates are allowed to shower under controlled circumstances. *(Id.)*

After a lockdown is imposed and the prison is secured, prison officials investigate and report on what occurred. (DER 695-97, RT [Pliler] 487:21-489:10.) That process is time-consuming and requires staff to interview inmates, often more than once; search cells and common areas; screen telephone calls and mail; and evaluate security to determine whether, when, and how normal

programming can be resumed. (DER 897, RT [Pliler] 689:12-18.]

The goal is to resume normal prison operations as quickly as safety allows. (DER 878, RT [Pliler] 670:1-5.) When prison officials believe it is safe to do so, they can allow all or selected groups of inmates to use the main exercise yard, or allow smaller groups of inmates to use the small concrete yards for outdoor exercise to see how they behave in a controlled setting. (DER 879, RT [Pliler] 671:3-9.)

Although the small yards were used on occasion, they were generally not used to exercise the whole general population in Facility B because gangs or ethnic groups often pressured other inmates to participate in violence, and the refusal of an inmate to do so could pose a risk to his safety because he could be attacked and injured on the yards. (DER 661, RT [Pliler] 453:7-23.) Instead, the small yards were used as the first step in determining whether small groups of compatible inmates could exercise together safely again. *(Id.)*

For example, after the January 2002 lockdown, Southern Hispanic inmates, who were responsible for the staff assault that had led to the lockdown, were initially allowed to exercise on the small yards before being allowed access to the main yard. Likewise, African-American inmates used those yards after their access to the main yard was suspended following Crip assaults on staff. And White and Southern Hispanic inmates used those yards after inmate-on-inmate violence involving those groups. (CR 158-2, DER 94, 102, 130, 162, 164, 166, 168.)

Even when prison officials felt it was safe to use the small yards, assaults also happened there. (DER 927-28, RT [Pliler] 719:9-720:23.) When that occurred, officials were back to square one and had to re-impose restrictions and start all over. *(Id.)* As a result, officials were cautious and wanted to be sure it was safe before releasing inmates to exercise. (DER 935, RT [Pliler] 727:22-2; (DER 685, RT [Pliler] 477:23-24.) Because of similar safety concerns, prison officials did not use the housing-unit day rooms for exercise. (DER 662, RT [Pliler] 454:15-24.)

3. Suspension of Norwood's Outdoor Exercise.

Because of the ongoing violence in Facility B, normal prison operations were suspended for almost two years. During that time, prison officials modified prison programs, including access to exercise on the yard, to stop the violence and prevent its recurrence. As a result, Norwood was not allowed outdoor exercise for about eighty days during the first two suspensions of outdoor exercise, five months during the third, and about sixty days during the fourth. (CR 124, DER 24:9-13.)

Prison officials did not believe that Norwood would suffer physical or mental consequences as a result of the time he was denied outdoor exercise because essential medical and mental health services were provided, and he sustained no actual harm because of the restrictions on outdoor exercise. (DER 856, RT [Vance] 648:5-23; DER 885, RT [Pliler] 677:21-678:1; DER 939, RT [Goughnour] 731:7-16; CR 152, DER 6:13-21, DER 8:20-28, DER 10, 21-27, DER 12:26-13:6.)

4. Initial Lockdown and Suspension of Outdoor Exercise - January 4 to March 27, 2002.

On January 4, 2002, inmates attacked officers in a Facility B dining hall, stabbing one and almost killing him. (CR 124, DER 24:15-17; DER 707, RT [Pliler] 499:6-12.) After restoring control, prison officials locked the facility down and began an investigation. Prison officials only knew that staff injuries were serious and that the attackers were Hispanic inmates. (DER 706, RT [Pliler] 498:1-10.) They did not know whether the attack was planned or was an isolated incident. (DER 706, RT [Pliler] 498:16-24.) Inmates of various races worked in the dining room and prison officials never determined the inmates to whom the weapons used in the attacks belonged. (DER 770, RT [Norwood] 562:13-22.)

Almost immediately after the lockdown was imposed, an inmate assaulted and seriously injured another inmate in the facility, and, about two weeks later, weapons were confiscated from three inmates. (DER 900, RT [Pliler] 692:10-17.) Then, a month later, an inmate was killed, and shortly after that, there was another inmate-on-inmate attack. *(Id.* 692:16-19.)

By mid-March 2002, prison officials determined that inmates associated with Hispanic street gangs were responsible for the January 2002 attacks, moved the responsible inmates to other prisons, and began relaxing program restrictions and resuming normal operations. (CR 158-2, DER 71.) The first inmates allowed to resume outdoor exercise were critical inmate workers, and Norwood was among the second group of those workers who were allowed to

resume exercise in late March 2002. (DER 897, RT [Pliler] 689:19-23.)

5. Second Suspension of Outdoor Exercise Lockdown - May 8 to July 31, 2002.

Normal programming and exercise had not been fully restored for all inmates in the facility when another assault on staff occurred May 8, 2002. (CR 158-2, DER 83-84.) About a month earlier, normal yard exercise had resumed for all inmates, except Hispanics. (CR 158-2, DER 75.) But less than a week later, there was a stabbing involving White inmates on the main yard, and prison officials noted that there was tension involving African-American inmates associated with Crip street gangs from the Los Angeles area. (CR 158-2, DER 77.) The next day, there was a stabbing assault involving White and Southern Hispanic inmates. *(Id.)* As a result, Southern Hispanics, Southern Crips, and White inmates were not allowed on the main yard. *(Id.)*

At the end of April, prison administrators resumed normal yard exercise for Southern Crips, but not for White and Southern Hispanic prisoners. (CR 158-2, DER 81.) Yard for other prisoners, including African-American inmates like Norwood, remained normal. *(Id.)* White inmates who were critical workers were allowed to resume normal yard exercise several days later. (CR 158-2, DER 83.)

A week later, in early May 2002, an African-American inmate, who was a Crip gang member, stabbed an officer in a dining hall. (CR 158-2, DER 85.) Prison administrators responded by discontinuing the resumption of normal

programming, including yard for all inmates. *(Id.)* All African-American inmates, including inmates like Norwood who were not affiliated with gangs, were locked down because gang members often pressured unaffiliated inmates to assist them by carrying messages to other inmates during lockdowns. (DER 901, RT [Pliler] 693:18-694:18.)

In late May 2002, prison officials began to gradually restore normal programming; and by mid-July 2002, they allowed some prisoners, other than African-American inmates, to resume outdoor exercise. (CR 158-2, DER 87-94.) Southern Hispanic inmates were allowed to use the small concrete yards in groups of sixteen prisoners at a time. (CR 158-2, DER 94.) White, American Indian, and inmates of other races who were critical workers were allowed limited access to the main yard. *(Id.)*

Normal yard resumed for all inmates, except African-Americans, about a week later, but the number of inmates on the yard at any time was limited to 100. (CR 158-2, DER 100.) The following week, Norwood and other African-American inmates were allowed to exercise in groups of twenty on the small concrete exercise yards, and the number of other inmates who could use the main yard at any time was increased to 150. (CR 158-2, DER 102, pp. 38-39.)

During the second lockdown, there were six batteries on officers and one on an inmate. (DER 901, RT [Pliler] 693:10-16.)

6. Third Suspension of Outdoor Exercise - December 28, 2002 to May 15, 2003.

Normal programming and outdoor exercise had not been fully restored when, in early August 8, 2002, a White inmate was stabbed on the main exercise yard. (CR 158-2, DER 102-107.) Prison officials suspended access to the main yard for White inmates and continued to limit yard exercise for Norwood and other African-American inmates to groups of twenty on the small concrete yards. *(Id.)* Access to the main exercise yard for other inmates continued to be limited to 150 at a time. *(Id.)*

About a week later, staff discovered a significant amount of metal, which could be used for weapons, missing from the dining halls. (CR 158-2, DER 108.) Prison officials locked down Facility B and suspended yard until searches of the cell blocks could be completed. *(Id.)* Several days later, a number of White and Hispanic prisoners were seriously injured in an incident on one of the small concrete yards. (CR 158-2, DER 112.)

At the end of August 2002, normal yard was resumed for African-American, American Indian, and other inmates, but not for White and Hispanic inmates, who had been involved in the most recent violence. (CR 158-2, DER 114.) Five days later, African-American inmates, who were members of the Bloods street gang, assaulted inmates in one of the cell blocks. (CR 158-2, DER 116.) Prison officials altered programming for Blood inmates, including discontinuing yard. *(Id.)* Norwood, and other African-American inmates, who were not Bloods, were allowed outdoor exercise on the main yard.

(DER 906, RT [Pliler] 698:22-700:6.) Yard for White and Hispanic inmates remained suspended. (CR 158-2, DER 116.)

Three weeks later, in late September 2002, staff found more metal, which could be used for weapons, missing from the facility's medical clinic. (CR 158-2, DER 118.) Prison administrators restricted inmate access to work areas and suspended yard Exercise for all Level IV inmates, including Norwood. (*Id.*) After an investigation, normal yard was restored a few days later for all inmates, except Hispanics, who were allowed to exercise on the small concrete yards. (CR 158-2, DER 120.) But the next day, yard exercise was again suspended for all inmates after several inmates were seriously injured as prisoners were being released to the main yard because of an altercation involving White and Hispanic inmates. (CR 158-2, DER 122.) Officers searched the main yard and found numerous weapons in the areas used by White and African-American inmates. *(Id.)*

Two months later, in late November 2002, prison officials learned that Blood inmates were planning to attack staff and suspended yard exercise for them, but not for other African-American inmates. (CR 158-2, DER 126.) After another incident the following month involving White and Southern Hispanic inmates in which a White inmate was seriously injured, yard was suspended for all inmates until staff could move White and Southern Hispanic inmates into separate housing units. (CR 158-2, DER 130.)

Then, on December 28, 2002, African-American inmates, who were Crip gang members, attacked and tried to kill an officer on the main yard. (CR 158-2, DER 132; DER 955, RT [Tatum] 747:1-15.).) Prison officials suspended yard exercise for all Level IV inmates, including Norwood, and searched the cells of all general population inmates in Facility B. (CR 158-2, DER 139, 141.)

In mid-February 2003 there was an incident involving White inmates and use of a deadly weapon in one of the cell blocks. (CR 158-2, DER 149.) Prison officials ordered that the cells of White inmates in two housing blocks be searched. *(Id.)* Yard exercise was suspended for all Level IV inmates, except Asian, American Indian, and Other (e.g. Pacific Islander) inmates, groups who had not been involved in the violence that had occurred. *(Id.)*

The following month, prison officials allowed White and Southern Hispanic inmates to exercise on the small concrete yards, but continued the suspension of yard for African-American inmates. (CR 158-2, DER 162.) However, in early May 2003, White prisoners were involved in two separate assaults on inmates that resulted in serious injuries to other prisoners. (CR 158-2, DER 164.) Asian-American, and other prisoners were allowed normal yard access, but yard access was suspended for White prisoners. *(Id.)*

Several days later, prison officials allowed White inmates, as well as Southern Hispanic and African-American inmates, to exercise on the small concrete yards adjacent to their housing units on a rotating schedule and in the evening because of the

large number of inmates involved. (CR 158-2, DER 164, 166, 168.)

During the third suspension of outdoor exercise, there were four attempted batteries on officers, five batteries or attempted murders of inmates, five instances of inmate possession of weapons, and one instance of an inmate inciting a disturbance. (DER 916-17, RT [Pliler] 708:19-709:12.)

7. Fourth Suspension of Outdoor Exercise - September 3 to November 4, 2003.

Normal programming, including access to the main yard, still had not been fully restored because of ongoing attacks by inmates on each other, when the next staff assault occurred in September 2003 (CR 158-2, DER 170-171.)

On June 1, 2003, two weeks after Norwood was allowed to resume exercise with other African-American inmates on the small concrete yards, another slashing incident involving White inmates occurred in a cell block. (CR 158-2, DER 170.) Yard was suspended for White inmates. *(Id.)* By mid-June 2003, only Level IV White inmates were not allowed on the main yard. (CR 158-2, DER 172.)

But days later, prison officials received confidential information that African-American inmates, who were Crip gang members, were planning to attack staff. (CR 158-2, DER 174.) Prison officials responded by locking down Crip inmates and those celled with them, and suspending their yard privileges. *(Id.)*

A month later, after White and Crip inmates had been allowed to resume use of the main yard, Crip inmates attacked an inmate on the yard, and officers found a weapon. (CR 158-2, DER 176.) The next day, there was an assault by White inmates on the yard. *(Id.)* Prison officials suspended yard for all inmates while the main yard was searched. *(Id.)*

After yard privileges had been restored for some inmates, prison officials again suspended yard exercise in late August 2003 for Crip and Hispanic inmates who were members of the Border Brothers street gang, and inmates who were celled with them. (CR 158-2, DER 184.)

Less than two weeks later, prison officials suspended yard for all Level IV inmates and locked down Crip inmates and those celled with them after a Crip inmate slashed a female officer with the lid of a tuna can and threw her down two flights of stairs. (CR 158-2, DER 185; DER 712-13, RT [Willey] 504:1-505:21; DER 737, RT [Walker] 529:5-7.) A few days before, the inmate had been counseled by the officer for masturbating in front of her. (DER 732, RT [Walker] 524:4-7.) The inmate was being escorted to a shower, but was not required to be in restraints. (DER 732-33, 747-48, RT [Walker] 524:24-525:1; 539:6-8; 540:9-12.) The attacker, and two other inmates who were suspected of being involved, were placed in administrative segregation. (DER (DER 713, 718, 738, RT [Willey] 505:10-16; 510:19-22; DER 738, RT [Walker] 530:13-15.)

Prison officials were not sure whether this was an isolated incident or whether other attacks were planned. (DER 720, RT [Willey] 512:4-9.) Because of

the series of actual and planned staff assaults that had occurred, prison officials locked down the prison, and declared a state of emergency. (DER 735, RT [Walker] 527:3-14, CR 158-2, DER 187.) Only those inmates with low security levels, who were housed in dorms, were allowed exercise on the main yard. (CR 158-2, DER 187.) After an investigation, prison officials concluded that the attacker acted alone. (DER 742, RT [Walker] 534:1-2.)

Norwood was allowed to resume yard on November 4, 2003, but the violence continued, and normal yard remained suspended for Crip and Level IV White inmates and those who were celled with them. (CR 158-2, DER 190-91.) This lockdown ended on December 3, 2003. (CR 124, DER 25:1-2.)

B. Proceedings in the District Court

This action proceeded on the second amended complaint filed June 7, 2005. (CR 25, 28.) Prison officials answered the complaint and asserted qualified immunity from damages as an affirmative defense. (CR 30, 48.)

Prison officials moved for summary judgment on March 23, 2006. (CR 79.) A magistrate judge granted summary judgment on the injunctive-relief claim because it was moot, but denied qualified immunity on the damage claims because he concluded that, although the suspensions of exercise in response to violence were justified, prison officials had not provided (1) "specific evidence" that a "security emergency" continued until Norwood was allowed to resume outdoor exercise, and (2) evidence showing why African-American inmates, like

Norwood, were the last inmates to be allowed to resume exercise after the last three lockdowns. (CR 103, 40:17-14; 43:4-9.) The district court adopted the findings and recommendations on March 5, 2007. (CR 105.)

The pretrial order stated that prison officials had not abandoned any issues and that they renewed their contention that they were entitled to qualified immunity on the basis of the evidence to be presented at trial. (CR 24, DER 28:8-11.) The pretrial order also stated that the decision to impose a lockdown and suspend exercise in response to staff assaults was proper and governed by the malicious-and-sadistic standard in *Whitley v. Albers*, 475 U.S. 312 (1986). (CR 124, DER 25:10-11.) Consistent with Ninth Circuit precedent, the district court found that the deprivation of outdoor exercise after the "precipitating event" was governed by the deliberate-indifference standard of *Farmer v. Brennan*, 511 U.S. 825 (1994). (CR 124, DER 25:12-26:9.)

At trial, defendants requested the following jury instruction:

> The deprivation of regular outdoor exercise can constitute cruel and unusual punishment in violation of the Eighth Amendment. A prisoner's right to outdoor exercise, however, is not absolute. Such exercise must be provided unless inclement weather, unusual circumstances, or disciplinary needs made that impossible.
>
> In considering whether defendants were deliberately indifferent to the need for outdoor exercise, the jury should consider

> that defendants had a compelling obligation under the Eighth Amendment to ensure the safety of prisoners, including protecting prisoners from each other. In considering these factors, you should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. (CR 139, p. 12; DER 21.)

Defendants' instruction referenced *Bell v. Wolfish*, 441 U.S. 520 (1979).

When petitioner objected to that instruction, the trial judge said he had not read the Supreme Court authority on which prison officials relied, but that he had read the Ninth Circuit cases, and that there was no doubt that prison officials had a competing obligation to ensure prisoner safety; that he knew it; and that although he did not know if a lay person would know it, he "would be shocked" if a juror did not. ((DER 989; RT 781:19-24.) The district court judge then said he did not understand what "deference" meant in the circumstances of this case, did not know the context in which it had been used in the cases cited for the proposed instruction, and refused to give the requested instruction. (DER 989, RT 782:23-783:22.)

During its deliberations, the jury requested further instructions on the meaning of "deliberate indifference," with emphasis on "deliberate." (CR 140, DER 15.) The district court referred the jury to another instruction that did not contain the requested deference language, but instead instructed the jury that prison officials could be liable if they

disregarded a serious risk of harm without taking reasonable measures to correct it. (DER 1093, RT 855:20-21.)

The jury rendered a verdict on November 8, 2007, finding that prison officials had violated Norwood's Eighth Amendment rights, even though he had suffered no actual harm from the temporary exercise suspensions and awarded nominal damages of $1 against each defendant for each lockdown in which they were involved and a total of $39,000 in punitive damages. (CR 152; DER 7:1-6, DER 9:8-13, DER 11:8-12, DER 13:15-20.) On November 13, 2007, the district court entered judgment for plaintiff in accordance with the jury's verdict. (CR 153; DER 4.) Prison officials appealed on December 12, 2007. (CR 157; DER 1-3.)

C. Proceedings in the Court of Appeal

On appeal, the Ninth Circuit held that the district court erred in refusing to give the requested *Bell* deference instruction because the *Farmer* deliberate-indifference instruction by itself did not alert the jury that it was required to defer to prison officials' judgment where measures to maintain institutional security, and the safety of prisoners and staff, were concerned. *Norwood*, 591 F.3d at 1067. The court of appeals found that the requested instruction was not drawn from *Whitley*, but from *Bell*, and that deference applied in both excessive-force cases and conditions-of-confinement cases where institutional security, staff safety, and inmate safety were concerned. *Id.* The court reasoned that a jury would not know that it had to defer unless it was told to do so, and that the failure to give the

instruction resulted in an incomplete and misleading statement of the law that was prejudicial because the jury might well have reached a different verdict if properly instructed. *Id.*

The court of appeals then held that remand for a new trial was unnecessary because prison officials were entitled to qualified immunity since the right to outdoor exercise in the midst of severe ongoing prison violence was not clearly established so that a reasonable officer would know that his conduct was unlawful in the situation he confronted. *Norwood,* 591 F.3d at 1068 (citing *Saucier v. Katz,* 533 U.S. 194, 202 (2001). In recognition that the qualified immunity inquiry is highly context-sensitive, the court explained that the cases Norwood cited were distinguishable on their facts because they either concerned denials of exercise for inconsequential logistical concerns, or the rights of prisoners confined in administrative segregation or disciplinary detention for periods of time ranging from one to four years, rather than attempts to restore order during a series of brutal attacks, some lethal or nearly so. *Id.*

The court of appeals went on to explain that, in the factual circumstance at issue in *Norwood,* prison officials had a duty to keep inmates safe and protect them from each other, and had to balance that imperative against the obligation to provide outdoor exercise. *Id.* The circuit court held that when the violence rises to unusually high levels, prison officials could reasonably believe that it was lawful to temporarily restrict outdoor exercise to bring the violence under control. *Id.* And prison officials are entitled to wide-ranging deference in balancing those obligations, and their judgment about when it was

safe to restore exercise and other programs should not be lightly second-guessed. *Id.* at 1069-70. Finally, the Ninth Circuit found that district courts in the circuit had found no Eighth Amendment liability on similar facts, further indicating that the law was not clearly established.

REASONS CERTIORARI SHOULD BE DENIED

The Court should deny certiorari because there is no circuit conflict; the court of appeal properly applied established law, and review of its factual findings is not a reason to grant the petition.

I. CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION COMPORTS WITH ESTABLISHED LAW, AND DOES NOT CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEAL.

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. "It is obduracy or wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991). Wantonness "does not have a fixed meaning, but must be determined with 'due regard to differences in the kind of treatment against which an Eighth Amendment objection is lodged.' " *Id.* (citing *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

A prisoner is entitled to some form of regular outdoor exercise, and the long-term denial of outdoor exercise can constitute a violation of the Eighth Amendment. *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1995); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (prisoners in disciplinary detention over four years). The denial of outdoor exercise, however, is not per se unconstitutional, and prison officials can suspend inmate access to it in response to emergencies involving institutional safety and security. *Hoptowit v. Ray*, 682 F.2d 1237, 1259 (9th Cir. 1982). There is no bright-line test for determining whether the denial of outdoor exercise for safety and security reasons is unconstitutionally long; the inquiry must proceed from the individual facts of each case. *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984).

"[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained rights of convicted prisoners . . ." *Bell*, 441 U.S. at 546-47 (recognizing that internal security within the correctional facilities themselves is central to all other correctional goals). Whether the prison disturbance is a riot or a lesser disruption, prison officials must balance the need to maintain or restore discipline through force or other means against the risk of injury to inmates. *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). Both situations may require prison officials to act quickly and decisively, and both implicate the principle that prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional

security. *Id.* (citing *Whitley*, 475 U.S. at 321-322, and *Bell*, 441 U.S. at 547.) Whenever prison officials stand accused of using excessive physical force in violation of the Eighth Amendment, the core judicial inquiry is that set out in *Whitley*: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. *Id.*

Because a prison official's obligation to provide for prisoner medical needs "does not ordinarily clash with other equally important government responsibilities," deliberate indifference constitutes wantonness in that context. *Hudson*, 475 U.S. at 320; *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994). That is because deliberate indifference can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff and other inmates. *Whitley*, 475 U.S. at 320 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976). But when institutional safety and security concerns are present, the deliberate-indifference standard does not always capture the importance of balancing competing obligations. *Whitley*, 475 U.S. at 320.

The Ninth Circuit applies a combination of *Whitley* and *Farmer* analysis to the kind of rolling, widespread prison violence at issue here. *Johnson v. Lewis*, 217 F.3d 726, 733-34 (9th Cir. 2000). It applies the *Whitley* malicious-and-sadistic/good-faith standard to the initial measures taken to stop violence, even though the exercise suspensions themselves do not involve the use of physical force, and the *Farmer* deliberate-indifference standard to whether circumstances warrant the continuation of

exercise restrictions to prevent the recurrence of violence. *Id.* The rationale for using different standards is that the emergency situation that existed at the time of the riot would presumably be absent at the time prison officials had to make decisions regarding conditions of confinement during a lockdown. *Id.* In the case of exercise, that rationale does not take into account competing concerns about preventing the recurrence of violence, or that the Eighth Amendment inquiry remains the same – whether the exercise restrictions were imposed or maintained for the purpose of causing harm or to ensure institutional security, staff safety, and inmate safety. As a result, a district court, can deny qualified immunity and ask the jury to decide whether an "emergency" continued to exist that warranted the continued exercise restrictions, i.e. the kind of hindsight decision about the reasonableness of a particular security measure neither a court or jury is supposed to make.

This Court need not grant certiorari to decide whether that combination of standards applies because the Ninth Circuit's requirement of a deference instruction and qualified immunity finding produced the proper result. A heightened standard of deference under the deliberate-indifference standard applies to post-riot actions taken by prison officials immediately after a riot, although it may be less than the *Whitley* standard applied in the face of immediately exigent circumstances. *Lewis*, 217 F.3d at 733-34. When the potential for prison violence ripens into actual unrest, the admonition that a prison's internal security is peculiarly a matter normally left to the discretion of prison

administrators carries special weight. *Whitley*, 475 U.S. at 321.

The principle that judges and juries must afford wide-ranging deference to prison officials' judgments about policies and practices to preserve and maintain institutional security is well-established. Decisions regarding prison security are peculiarly within the province and professional expertise of prison officials, and, in the absence of substantial evidence in the record to indicate that officials have exaggerated their response to these considerations, courts and juries should ordinarily defer to their expert judgment in such matters. *Pell v. Procunier*, 417 U.S. 817, 827 (1974). The deference accorded to prison officials extends to measures taken in response to violence, as well as to measures taken to prevent its recurrence. *Whitley*, 475 U.S. at 322-23. The deference owed to prison officials does not insulate them from actions taken in bad faith and for no legitimate purpose, but it does require that neither a judge nor jury freely substitute their judgment for that of officials who have made a considered choice. *Id.* at 322.

The jury instruction requested by prison officials and rejected by the district court accurately stated the law. There is no conflict with this Court's precedent or that of other circuits.

A deference instruction in conditions-of-confinement cases, where there are competing institutional safety and security concerns, does not conflict with *Johnson v. California*, 543 U.S. 499 (2005). In *Johnson*, this Court declined to apply the *Turner* reasonable-relationship test to a claim that

racial classifications in a prison reception center violated the Equal Protection Clause of the Fourteenth Amendment. *Johnson*, 543 U.S. at 509-10. *Norwood* concerned only an Eighth Amendment outdoor exercise claim, and the Ninth Circuit stated that its opinion did not address any race-based aspect of the lockdowns or any potential equal protection claim. *Norwood*, 591 F.3d at 1066 n.1.

The Court in *Johnson* stated the reasonable-relationship test set forth in *Turner v. Safley*, 482 U.S. 78 (1987) applied only to rights that are inconsistent with proper incarceration; it did not apply to Eighth Amendment claims of deliberate indifference. *Johnson*, 543 U.S. 509-11. The court of appeals in this case did not apply *Turner*, as petitioner contends, but rather *Farmer's* deliberate-indifference test. *Norwood*, 591 F.3d at 1067. And *Johnson* did not hold that prison officials are not entitled to deference in any Eighth Amendment case, but only that "mechanical deference" is not appropriate. *Johnson*, 543 U.S. at 510 (citing *Spain*, 600 F.2d at 193-94.)

Johnson did not reverse *Bell*, *Pell*, *Whitley*, or any of this Court's other precedents holding that deference is owed where there are competing concerns between institutional safety and security and the obligation to provide outdoor exercise. And, *Johnson* did not hold that a jury instruction that properly stated the law as to the deference that is owed in cases like this was improper. Norwood concedes that deference undergirds the *Whitley* and *Farmer* standards, but he argues that this Court should announce a general rule that bars trial courts from giving a deference instruction in these cases

because deference is "implied" in the standards themselves and giving an explicit deference instruction would amount to "a directed verdict."

Because deference is the law, it cannot be improper to instruct the jury to apply deference; in fact, failure to do so would make the instruction incomplete and misleading, as the Ninth Circuit held. *Norwood*, 591 F.3d at 1067. The same considerations that apply to measures taken to stop prison violence also apply to measures taken to prevent its recurrence. *Whitley*, 475 U.S. at 322. As the Ninth Circuit explained, restrictions on confinement and the use of force are "often flip sides of the same coin" because a "more restrictive confinement may diminish the need for force and vice versa." *Norwood*, 591 F.3d at 1067. Following *Norwood*, the Ninth Circuit added deference language to its deliberate-indifference instruction. 9th Cir. Model Civ. Jury Instr. 9:25 (2009).

Petitioner's assertion that a deference instruction is never given in deliberate-indifference cases is not supported by any authority and misstates the facts. The same instruction rejected in *Norwood* was given by the same court in a prior Eighth Amendment deliberate-indifference case against some of the same defendants involving a lockdown and suspension of exercise following a prison riot several years before in which inmates assaulted each other. *See Hebbe v. Pliler*, et al., E.D. Cal. No. 2:00-cv-306-EFB P, CR 147, Instr. 17, filed Sept. 7, 2007.)

The Ninth Circuit properly found that a deference instruction should be given in deliberate indifference cases like this, where prison officials have competing obligations to ensure institutional security and prisoner safety, and to provide access to exercise, because the *Farmer* standard by itself did not capture those competing obligations and left the jury with the belief that it was free to substitute its judgment for that of prison officials about how that balance should have been struck. *Whitley*, 475 U.S. at 320. As the Ninth Circuit found, prison officials err on the side of caution in maintaining the lockdowns for longer than necessary, but, when it came to matters of life and death, such caution was a virtue; and no official could have reasonably anticipated that such prudence would be found to violate the Eighth Amendment. *Norwood*, 591 F.3d at 1069.

Because all the factual circumstances in which deference is owed to the judgment of prison officials cannot be anticipated, Norwood's argument that no deference instruction should be given in any Eighth Amendment deliberate-indifference case is unwise and inappropriate. This Court should not grant certiorari to adopt such a rule.

II. PRISON OFFICIALS WERE ENTITLED TO QUALIFIED IMMUNITY.

Petitioner argues that the Ninth Circuit (1) did not defer to the jury's verdict and findings in granting qualified immunity, or (2) that it did not review the evidence presented at trial in the light most favorable to him. Both arguments ask this

Court to review the Ninth Circuit's assessments of the facts and inferences to be drawn from those facts, and this Court should deny certiorari to do so.

A. The Ninth Circuit Was Not Required to Defer to the Jury's Verdict Because Its Findings Were a Nullity, Having Been Vacated for Instructional Error.

Norwood argues that the Ninth Circuit ignored precedent that requires a court to construe evidence in favor or the prevailing party when the defense of qualified immunity is asserted, and that deference should be afforded to the "jury's discernible resolution of disputed factual issues." (Pet. Br. 12-13.) Norwood has misstated the law.

The allegedly conflicting decisions are distinguishable because, unlike *Norwood*, they do not concern a grant of qualified immunity where a jury verdict was vacated for instructional error. In *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999) and other cases cited by Norwood, the jury's verdict was not vacated for instructional error. (Pet. Br. 12-13, 16.). For that reason, *Norwood* is not like *Ortiz v. Jordan*, 316 Fed.Appx. 449 (6th Cir. 2009), *cert.* granted 2010 WL 1641312 (Apr. 26, 2010) (granting qualified immunity after jury verdict that was not vacated for instructional error.)

The Ninth Circuit properly found that the failure to give additional guidance on deference rendered the instruction incomplete and misleading, and that the jury might well have reached a different conclusion if it had been properly instructed. *Norwood*, 591 F.3d at 1062 (citing *Clem v. Lomeli*,

566 F.3d 1177, 1182-83 (9th Cir. 2009)). For that reason, there is no jury verdict to which the court of appeal was required to defer in deciding the qualified immunity question, and no conflict that warrants the grant of certiorari.

Because Norwood addressed the qualified immunity question on the merits in his appeal, the Ninth Circuit was free to exercise its discretion to review the evidence de novo in the light most favorable to plaintiff, rather than remanding for a new trial, and to find that prison officials were entitled to qualified immunity. *Norwood* 591 F.3d at 1067-68.

B. The Ninth Circuit Reviewed the Evidence De Novo and in the Light Most Favorable to the Prisoner.

Norwood argues that the Ninth Circuit did not consider all the evidence in the record, and that it improperly found that he failed to offer evidence that prison officials acted in bad faith or with punitive intent. *Norwood*, 591 F.3d at 1069. That argument rests primarily on the claim that the jury's verdict is an implicit finding of bad faith. However, because the jury verdict was vacated for instructional error, it has no evidentiary significance. The Ninth Circuit properly reviewed the facts in the light most favorable to petitioner. Norwood's request that this Court review the court of appeals' factual findings and assessment of the evidence is not a reason to grant certiorari.

Norwood, cannot rely on a jury award that is a nullity because it was vacated, and the court of appeals was not required to draw inferences that are not supported by facts. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 631-32 (9th Cir. 1987) (citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986)).

The Ninth Circuit properly found that Norwood did not offer evidence that the lockdowns were meant to be punitive or were otherwise implemented in bad faith, circumstances in which deference is not owed. *Norwood*, 591, F.3d at 1069; *Whitley*, 475 U.S. at 322-23. This is not a case where there was evidence that prison officials denied adequate food, water, and shelter in order to punish prisoners for a riot. *Compare Lewis*, 217 F.3d at 731-35. (Summary judgment denied where inmates were exposed to elements and high temperatures on prison exercise yard and not provided toilets, water, and edible food for four days after a riot, and officers made statements showing punitive intent).

Norwood did not present substantial evidence that prison officials' actions were an exaggerated response to what no one disputed was ongoing serious violence and threats to institutional security and staff and inmate safety. *Pell*, 417 U.S. at 827. Contrary to Norwood's argument, the Ninth Circuit did not ignore his evidence, but found that it did not support his claims. *Norwood*, 591 F.3d at 1069-70. As the court of appeals explained, restricting exercise for all inmates, rather than specific groups, and imposing those restrictions, in some cases, for a longer time after assaults on staff than after assaults on inmates did not support an inference of punitive

intent where members of Crip street gangs assaulted staff and threatened non-affiliated African-American inmates to assist them, and staff assaults were, by their nature, more serious challenges to prison authority than attacks on other inmates. *Id.*

Norwood's assertion that inmates were locked down for longer periods in response to staff assaults than inmate-on-inmate assaults is incorrect because the reasons for the length of the exercise suspensions cannot be so neatly separated. Staff assaults were followed by inmate-on-inmate assaults by different groups and then further staff assaults. And White, Crip and Southern Hispanic inmates were locked down without exercise on occasions for a month and a half or more following inmate-on-inmate assaults, amounts of time comparable to all but one of the four exercise restrictions that Norwood claims were imposed in response to staff assaults.

The petition does not point to evidence of bad faith, but merely expresses its disagreement with the prison officials' reasoned choices, disagreement that the Ninth Circuit found insufficient. *Norwood*, 591 F.3d at 1068-70. That is not a ground for granting certiorari.

C. Prison Officials Did Not Have Fair Warning that Their Efforts to Stop the Violence Would Violate the Eighth Amendment

Prison officials were entitled to qualified immunity because the right to outdoor exercise in the midst of severe, ongoing violence was not clearly established in cases involving facts not reasonably distinguishable from the situation they faced.

Norwood, 591 F.3d at 1068 (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)); *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). The question is whether the official's conduct was reasonable under the circumstances, not whether another more reasonable interpretation of events could be constructed after the fact. *Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991).

The Ninth Circuit did not ignore its own precedent on a prisoner's right to outdoor exercise, nor did it narrow those rights. Rather, it distinguished the cases on which petitioner relied in finding that a reasonable officer could have believed that restricting exercise on the facts of this case was consistent with Ninth Circuit precedent, and that there was no clearly established authority to the contrary. *Norwood*, 591 F.3d at 1070.

The only case cited by Norwood that concerned a lockdown in response to prison violence was *Allen*, which is distinguishable because it did not stand for the general proposition that a prisoner's right to outdoor exercise was absolute and indefeasible, or that it trumps all other considerations. *Norwood*, 591 F.3d at 1068. Rather the Ninth Circuit held that *Allen* survived summary judgment only because prison officials relied on inconsequential logistical concerns to justify the denials of access, while prison officials in Norwood had substantial reasons for the lockdowns. *Id.* at 1068-69.

Cases concerning inmates on long-term, indeterminate disciplinary detention who were not

allowed regular outdoor exercise are distinguishable from cases in which the exercise restriction is temporary and in response to widespread, ongoing prison violence. *Norwood*, 591 F.3d at 1070 (distinguishing *Spain* (denial of exercise to inmates in disciplinary detention for over four years) and *Toussaint* (denial of exercise to inmates in administrative segregation for over a year)). Finally, the Ninth Circuit correctly noted that several district courts had found no Eighth Amendment liability on similar facts and for suspensions of exercise twice as long as petitioner's, cases which petitioner does not address in his argument that the law was clearly established. Id. at 1070.

The facts of this case are distinguishable from those at issue in *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), which Norwood argues put prison officials on notice that the exercise suspensions were unlawful. *Hope* did not concern the denial of exercise following staff and prisoner assaults.

In *Hope*, this Court found that Alabama was the only state that chained prisoners to each other in work squads and handcuffed individual prisoners to "hitching posts" if they refused to work or otherwise disrupted work. *Hope*, 536 U.S. at 733. The prisoner refused an order to get off a work bus and then exchanged vulgar remarks and wrestled with an officer. *Id.* at 734. He was returned to prison and chained to a hitching post for seven hours without a shirt while the sun burned his skin, and he was given water only once or twice and no bathroom break. *Id.* Because the prisoner was only slightly taller than the hitching post, his arms were above shoulder height, and he became tired from being handcuffed so high.

Id. When the prisoner tried to move his arms, the handcuffs cut into his wrists. *Id.* An officer taunted him about his thirst, gave water to his dogs, and then kicked the water cooler over, spilling water on the ground while the prisoner watched. *Id.*

On those facts, this Court held that officials can be on notice that their conduct violates established law even in novel factual circumstances and that, while factually similar circumstances can provide especially strong support for a conclusion that the law is clearly established, they are not necessary for such a finding. *Hope*, 536 U.S. at 741. Thus, *Hope* held that the salient question in a qualified-immunity case is whether the state of the law at the time gave officials "fair warning" that their conduct was unconstitutional. *Id.* Significantly, this Court cited a number of prior cases in which corporal punishment had been found unlawful as evidence that prison officials were on fair notice that their conduct was unconstitutional. *Id.* at 741-44. This Court emphasized that the physical abuse of inmates as punishment after the prisoner had terminated his resistance had been found to violate the Eighth Amendment. *Id.* at 743-44.

Thus, *Hope* stands for the proposition that, where a violation is obvious under Eighth Amendment case law, officials have fair warning that their conduct is unconstitutional. *Galvin v. Hay*, 374 F.3d 739, 746 (9th Cir. 2004). Here, the Ninth Circuit correctly found that the parameters of the right to outdoor exercise in the midst of severe ongoing prison violence was not clearly established, and that at most prison officials erred on the side of caution in the length of time they maintained the

lockdowns. *Norwood*, 591 F.3d at 1068-69. But when it came to matters of life and death, erring on the side of caution is a virtue, and "[c]ertainly, no officer could reasonably have anticipated that such caution would be found to violate the Eighth Amendment. *Id.* at 1069.

CONCLUSION

The Court should deny the petition for certiorari because there is no conflict with this Court's precedent, or that of other circuits; and the law applied by the Ninth Circuit is well-established and does not require clarification; and review of the Ninth Circuit's factual findings is not a ground for granting certiorari.

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Respectfully submitted

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